

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 June 2021

**Public Authority:** Department of Health & Social Care  
**Address:** 39 Victoria Street  
London  
SW1H 0EU

#### **Decision (including any steps ordered)**

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1. The complainant requested copies of two reports relating to Exercise Cygnus. The Department of Health & Social Care ("the DHSC") relied on section 36 of the FOIA (prejudice to the effective conduct of public affairs) to withhold the requested information.
2. The Commissioner's decision is that sections 36(2)(b)(i), 36(2)(b)(ii), and 36(2)(c) of the FOIA are engaged in respect of this information. However, the balance of the public interest favours disclosure.
3. The Commissioner requires the DHSC to take the following steps to ensure compliance with the legislation.
  - Disclose the two reports. The DHSC may make appropriate redactions to remove the small amount of personal data.
4. The DHSC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 21 December 2020 the complainant requested information of the following description:

*"[1] Pandemic Influenza Briefing paper – NHS Surge and Triage (completed December 2017) – please provide me with a copy of this report.*

*"[2] Pandemic Influenza Briefing paper – Adult social care and community healthcare – please provide me with a copy of this report."*

6. On 22 January 2021, the DHSC responded. It refused to provide the requested information and stated that it was relying on section 36 of the FOIA to withhold it.
7. The complainant requested an internal review on the same day. The DHSC sent the outcome of its internal review on 18 February 2021. It upheld its original position.

## Scope of the case

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8. The complainant first contacted the Commissioner on 22 January 2021 to complain about the way his request for information had been handled. At that point, the DHSC had not had an opportunity to carry out an internal review.
9. Once the DHSC had completed its internal review, the complainant contacted the Commissioner again and the complaint was accepted. Given the general interest in the subject matter of the withheld information and its relevance to matters of current national debate, she decided to commence her investigation immediately.
10. The Commissioner considers that the scope of her investigation is to determine whether the DHSC has correctly applied section 36 of the FOIA to the withheld information.

## Background

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11. Exercise Cygnus was a pandemic preparedness exercise that was run in October 2016 to test how UK's health system would respond to an influenza pandemic. A variety of different organisations including NHS trusts, police forces, fire and rescue services and local authorities took part – alongside teams from central government. The Exercise Cygnus Report concluded that the UK's preparedness was not sufficient to cope with the demands of a severe pandemic.<sup>1</sup>

## Reasons for decision

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### Section 36 – Prejudice to the Effective Conduct of Public Affairs

12. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
13. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
- (a) would, or would be likely to, prejudice—*
    - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
    - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or*
    - (iii) the work of the Cabinet of the Welsh Assembly Government.*
  - (b) would, or would be likely to, inhibit—*
    - (i) the free and frank provision of advice, or*
    - (ii) the free and frank exchange of views for the purposes of deliberation, or*
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/927770/exercise-cygnus-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927770/exercise-cygnus-report.pdf)

14. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide her own opinion. The Commissioner's role in determining whether or not the exemption has been correctly applied is to: establish that an opinion has been provided by the Qualified Person; assure herself that that opinion is "reasonable" and; make a determination as to whether there are public interest considerations which might outweigh any prejudice.

#### *The Qualified Person's Opinion*

15. DHSC furnished the Commissioner with a copy of a submission that had been provided to Jo Churchill MP on 20 January 2021, outlining why it would be appropriate to rely on section 36 to withhold the requested information. The DHSC also provided a copy of a response sent from the Minister's Private Office the following day stating that the Minister had agreed that the exemption should be used.
16. Ms Churchill was (and remains at the date of this notice) the Parliamentary Under Secretary of State for Prevention, Public Health and Primary Care. Section 36(5) of the FOIA states that any Minister of the Crown is entitled to act as the qualified person in respect of a government department
17. Whilst it would have been preferable if Ms Churchill had more explicitly adopted the arguments in the submission as her own, the Commissioner nevertheless accepts that this is the case. She is therefore satisfied that that the Qualified Person gave an opinion on 21 January 2021.

#### *What was the Qualified Person's Opinion?*

18. The Qualified Person's Opinion stated that three limbs of section 36 were engaged. Namely section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
19. The Opinion states that:

*"[The Qualified Person] consider[s] it likely that release, especially at this time when the COVID-19 caseload is very high, could lead to an inaccurate understanding of the pandemic response amongst the public and negative changes in care-seeking behaviour. This is not in the public interest.*

*"Specifically:*

- *There is a risk that members of the public incorrectly believe that the hypothetical mechanisms for population triage and prioritisation of social and healthcare services described in the*

*briefing papers are being deployed in the current COVID-19 response. This is not the case. The current high COVID-19 caseload makes this misunderstanding more likely. [original emphasis]*

- This misunderstanding could lead to a loss of confidence in NHSE/I, all NHS trusts and the Government. The loss of confidence could lead to a reduction in care-seeking behaviour with consequential negative health impacts.*
- There is a risk of increased anxiety about the Government's response to COVID-19, particularly the treatment of those suffering from COVID-19 and other ill health. This could impact on mental health and behaviour towards medical staff.*

*"Disclosing these documents at this time is also likely to have a chilling effect on free and frank discussions in the future. A loss of a safe, open and frank space for Government officials and Ministers to discuss options for pandemic response similar to those set out in these two documents could damage the quality of advice and deliberation, potentially leading to a negative impact on decision making. It is important to preserve a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction."*

*Is the Qualified Person's Opinion reasonable?*

20. With regards to sections 36(2)(b)(i) and (ii), the Commissioner is sceptical that disclosure would be likely to prejudice the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. The exercise was carried out in 2016 and the final report produced in July 2017. At the time of the request in December 2020 there was little need for safe space to share ideas, debate these and deliberate on ways forward. This had already been completed.
21. In respect of a chilling effect, the Commissioner considers that civil servants should be robust, forthright and not easily dissuaded from sharing their views – regardless of the possibility of disclosure. The withheld information itself contains a large amount of factual information and it is difficult to see why public health officials would be dissuaded from providing such information in the future. The Qualified Person's Opinion does not put forward any specific arguments as to why disclosure of this specific withheld information would create a significant chilling effect in the future.

22. However, the Commissioner also recognises that the Qualified Person's Opinion need not be the most reasonable opinion a person could hold.
23. The Qualified Person has failed to clarify whether prejudice "would" result from disclosure or whether it only "would be likely to" result. In the absence of such a clarification, the Commissioner has therefore applied the lower bar of likelihood. Having done so, the Commissioner does not consider that it is a wholly unreasonable opinion to consider that disclosure might result in some form of inhibition in future – although the likelihood and severity of any inhibition will be considered further in the public interest test.
24. The Commissioner therefore accepts that section 36(2)(b)(i) and (ii) are engaged.
25. In respect of section 36(2)(c), the Commissioner's guidance on this limb of the extension states that, in order for it to be engaged, the Qualified Person must be able to identify some form of prejudice not envisaged by any other limb of the exemption.
26. In this case, the Qualified Person's Opinion has pointed to the possibility of individuals being dissuaded from seeking care, should they need it, because of a (misguided) perception that the Government is operating a policy of population triage.
27. The Opinion seeks to argue that disclosure of the withheld information, containing details of a hypothetical exercise, would confuse the general public as to what the Government's actual policy was. Members of the public who required care would not seek it because they believe they will be unable to have their concerns addressed – this can have potentially serious consequences (both for the individual and for the health service) if easily-treatable problems are not picked up early.
28. Once again, the Commissioner is not convinced (as she will go on to explain) that this prejudice is as likely or as severe as is claimed. However, once again she accepts that this Opinion falls within a spectrum of opinions that a reasonable person might hold and she therefore accepts that this limb of the exemption is also engaged.

#### *Public interest test*

29. Section 36 is a qualified exemption and therefore, even where prejudice is identified as resulting from disclosure, the information can only be withheld if the balance of the public interest favours maintaining the exemption.
30. Because the Commissioner has found that the lower bar of "would be likely to prejudice" has been met, this carries less weight in the public

interest test. Whilst there will always be some inherent public interest in preventing any identified prejudice from occurring, the weight to be assigned to that public interest will vary depending on the likelihood and severity of the prejudice identified.

31. In explaining why the public interest favoured maintaining the exemption, the DHSC explained that:

*"The department believes that there was a risk that members of the public would believe, incorrectly, that the hypothetical mechanisms for population triage and prioritisation of social and healthcare services described in the briefing papers were being deployed in the current COVID-19 response. At the time of the request, the number of COVID-19 cases was very high and hospital critical care capacity was strained. It would therefore have been feasible to members of the public at that time that not all patients could be treated and that the hypothetical triage mechanisms described in the briefing papers were being implemented. Neither situation was in fact the case.*

*"The potential for misunderstanding has been aptly demonstrated by a Sunday Times article with sensationalist headlines. This article followed on from journalists becoming aware of draft triage papers, different from but similar in principle to those being requested under this FOI, leading to misunderstanding and claims that people were being denied care. Much like the briefings requested under this FOI, the triage tool referenced in the Sunday Times article was never actually finalised or used, but this did not stop inaccurate reporting. NHSE&I felt it was essential to publish a full rebuttal blog explaining the inaccuracy of the article.*

*"Our concern was that a misunderstanding about the nature and use of triage mechanisms could have led to a loss of confidence in NHSE&I, all NHS trusts and the Government which, in turn, may have led to a reduction in care-seeking behaviour and consequential negative health impacts. The newspaper article shows how feasible it is that publication of the requested information would lead to similar misunderstandings and media reports, with the potential negative consequences outlined in the submission to the qualified person, including putting people off attending healthcare settings when needed.*

32. The DHSC also drew the Commissioner's attention to public comments made by several eminent scientists and doctors who had expressed concern about the possibility of patients failing to seek treatment.

33. On the other side of the ledger, the complainant, who is himself a doctor, pointed to the strong public interest in understanding whether the Government had a population triage plan and in what circumstances that plan would be implemented.
34. Just over a week before the DHSC responded to the request, the Nuffield Council for Bioethics had called on the Government to publish "authoritative and comprehensive national guidelines" in order to assist medical professionals – who would be responsible for implementing any triage plan.<sup>2</sup>
35. A national plan for patient triage would, the complainant argued, be extremely controversial and would require a national debate:

*"Disclosure of the Reports will go towards increasing the public understanding of the fact of and development of any policy on this issue – or indeed the absence of any such policy – and would allow a more informed debate.*

*"Secondly, there is a reasonable expectation that NHS England and the DHSC will discuss issues and formulate policy relating to public health, including the possible need for and/or basis of using population triage, in a free and frank manner with the public. These are matters on which there should be informed public debate."*

36. The complainant also pointed to the amount of information that had already been released into the public domain – apparently without causing prejudice.

#### *The Commissioner's view*

37. In the Commissioner's view, the balance of the public interest in this case favours disclosure of the information.
38. The Commissioner considers that the DHSC failed to give any meaningful thought to the public interest in disclosure. After comparing the two reports being withheld here to the National Security Risk Register, it noted that:

*"We considered arguments recognising that at some point in time it will be beneficial for the requested information to be released to the public. However, due to the sensitivity of the information discussed*

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<sup>2</sup> <https://www.nuffieldbioethics.org/news/statement-the-need-for-national-guidance-on-resource-allocation-decisions-in-the-covid-19-pandemic>

*in the documents in relation to the UK's response to the current global pandemic, it was agreed that it would not be in the public interest for this information to be released at this time."*

39. The Commissioner is issuing this decision notice at the same time as another decision notice (IC-55785-Q0Y1) to Public Health England – covering similar information, but requested in May 2020. In that decision notice, the Commissioner agreed with similar arguments to those advanced here by the DHSC and noted that, because of the timing of the request (slightly after the first peak of the pandemic), the public interest favoured maintaining the exemption.
40. In the present case, the request was made in December 2020 and responded to in January 2021. A considerable amount had changed between May and December of 2020 and, in the Commissioner's view, those changes have now tipped the balance of the public interest in favour of disclosure.
41. Firstly, the DHSC took the decision, in October 2020, to publish the main Exercise Cygnus report. The same arguments which it has relied upon to withhold the present information would, in the Commissioner's view, apply equally to the main report. It is difficult to see why additional prejudice would be caused by disclosure of these reports and the DHSC has not specified why this would be the case.
42. Secondly, the Commissioner considers that the DHSC's arguments about the possibility of a hypothetical exercise causing confusion would no longer carry significant weight at the point it responded to this request. By January 2021, the UK had already experienced three lockdowns and the public would be familiar with the approach that the Government *was* taking to deal with the pandemic – as opposed to a *hypothetical* exercise involving a similar but different virus. The Commissioner is satisfied that the public are and would be, able to distinguish between a four-year old report, in respect of a different (and hypothetical) virus and the real world data showing how the Government was dealing with the pandemic.
43. Thirdly, the Commissioner is not persuaded that there is a significant likelihood of disclosure causing the public to avoid seeking treatment above and beyond what was already happening.
44. The DHSC's arguments point out that there were already concerns that individuals who would ordinarily have sought medical treatment had been dissuaded from doing so. Indeed, a report considered by the Government's Scientific Advisory Group (SAGE) in July 2020 noted this

concerning trend. Although the report also noted that the trend was observable in Canada, Australia and Europe.<sup>3</sup>

45. In the Commissioner's view the more likely cause of such avoidance is a perception that hospitals (and medical professionals more generally) were so full of Covid-19 patients that they would either be unable to treat anyone else or that a visit to a hospital would significantly increase the risk of a Covid-19 infection. The widespread coverage of crowded hospitals and equipment shortages in the media would have heightened this perception amongst the public. This effect would be amplified because those most likely to need treatment (the elderly and infirm) were also those most at risk from the virus.
46. Given this saturation of media coverage, the Commissioner is therefore not persuaded that disclosure of this information, at the point the request was responded to, would have caused significant numbers of additional people to avoid seeking treatment. Whilst the Commissioner could accept such an argument at the start of the pandemic, by January 2021, assumptions about hospitals and the benefits of treatment would have been "baked in" to people's behaviour. Disclosure of the information would therefore have substantially less impact in January 2021, than it might have done in Spring 2020, during the first wave of the pandemic.
47. Turning to the DHSC's arguments about the free and frank provision of advice and the free and frank exchange of views, the Commissioner has always been sceptical of so-called "chilling effect" arguments. She expects civil servants and members of the medical profession to be robust and forthright in putting forward their views – regardless of the possibility of future disclosure.
48. Having reviewed the withheld information, the Commissioner has struggled to identify any matters which are particularly sensitive. A great deal of what is in the withheld information is already in the public domain – either in the Cygnus report itself or in other published papers. Other parts of the information are not in the public domain, but refer to actions which various organisations would obviously be expected to take or consider when faced with a pandemic (such as working together or sharing information).

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<sup>3</sup> <https://www.gov.uk/government/publications/dhsconsgadho-direct-and-indirect-impacts-of-covid-19-on-excess-deaths-and-morbidity-15-july-2020>

49. Whilst the focus of these two limbs of section 36 is on the *principle* of protecting free and frank debate, the Commissioner nevertheless considers that the public interest in maintaining the exemption will be lowest when the information is largely factual or mundane.
50. The Commissioner recognises that there is a very strong public interest in understanding how effectively the Government prepared for and has handled, the pandemic. Exercises like Cygnus were designed to test capability and to identify areas of weakness. Therefore it is important to understand whether lessons from Cygnus were properly learned and where appropriate, developed or addressed.
51. Furthermore, the Commissioner notes that the second of the two reports relates to proposals for population triage. This relates to a situation whereby the NHS becomes overwhelmed and is unable to treat all those requiring treatment. At that point, tough decisions have to be made as to who will receive treatment (and what treatment they will receive) and who doesn't. These are literally life and death decisions.
52. If clinicians (or even politicians) are being asked to make such decisions, it is vital that they are supported by a clear framework and that framework has been the subject of public debate. Any framework must be seen to be fair if it is to demand public confidence. The Commissioner therefore considers that there is a very strong public interest in understanding what considerations the Government has made about how a triage system would operate, when it would be triggered and by whom. This would inform the public and enable them to participate in the debate.
53. Having carefully considered the circumstances of this case, the Commissioner is thus satisfied that there is a strong public interest in disclosure of this information and, although the public interest in maintaining the exemption would have also been strong during the early stages of the pandemic, it had declined significantly by the time the request was responded to.
54. Whilst the Commissioner accepts that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA are all engaged in respect of this particular information, she considers that the balance of the public interest, in these particular circumstances, favours disclosure.

## Right of appeal

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55. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Gerrard Tracey**  
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